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No. 96-234

In the Supreme Court of the United States

OCTOBER TERM, 1996

STURM, RUGER & COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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15 pp

QUESTION PRESENTED

Whether the Occupational Safety and Health Administration (OSHA) properly issued an administrative subpoena, demanding documents related to ergonomic issues affecting petitioner's employees, as an adjunct to its investigation of possible violations of the general duty clause contained in Section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 654(a)(1).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	11

TABLE OF AUTHORITIES

Cases:

American Smelting & Refining Co. v. *OSHRC*, 501 F.2d 504 (8th Cir. 1974)	9
Department of Labor v. *Kast Metals Corp.*, 744 F.2d 1145 (5th Cir. 1984)	8
Donovan v. *Lone Steer, Inc.*, 464 U.S. 408 (1984)	6, 7
Donovan v. *Royal Logging Co.*, 645 F.2d 822 (9th Cir. 1981)	7
EEOC v. *Kloster Cruise Ltd.*, 939 F.2d 920 (11th Cir. 1991)	9
FTC v. *Monahan*, 832 F.2d 688 (1st Cir. 1987), cert. denied, 485 U.S. 987 (1988)	9
FTC v. *Swanson*, 560 F.2d 1 (1st Cir. 1977)	10
International Union, United Auto Workers v. *General Dynamics Land Sys. Div.*, 815 F.2d 1570 (D.C. Cir.), cert. denied, 484 U.S. 976 (1987)	7
Kastalon, Inc., 12 O.S.H. Cas. (BNA) 1928 (1986)	9
Marshall v. *Barlow's, Inc.*, 436 U.S. 307 (1978)	4
Midwest Instruments Co., In re, 900 F.2d 1150 (7th Cir. 1990)	8
Northeast Erectors Ass'n v. *Secretary of Labor*, 61 F.3d 37 (1st Cir. 1995)	6, 10
Oklahoma Press Publishing Co. v. *Walling*, 327 U.S. 186 (1946)	3, 4

Cases-Continued: Page

Reich v. *Montana Sulphur & Chem. Co.*, 32 F.3d 440 (9th Cir. 1994), cert. denied, 115 S. Ct. 1355 (1995) 8
See v. *City of Seattle*, 387 U.S. 541 (1967) 7
Stoddard Lumber Co. v. *Marshall*, 627 F.2d 984 (9th Cir. 1980) 8
Thunder Basin Coal Co. v. *Reich*, 510 U.S. 200 (1994) 10
United States v. *Comley*, 890 F.2d 539 (1st Cir. 1989) 4
United States v. *Establishment Inspection of Jeep Corp.*, 836 F.2d 1026 (6th Cir. 1988) 9
United States v. *Morton Salt Co.*, 338 U.S. 632 (1950) 3, 4, 6, 8

Constitution, statutes and regulation:

U.S. Const. Amend. IV 6
Administrative Procedure Act, 5 U.S.C. 553 8
Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.* 2
§ 5(a)(1), 29 U.S.C. 654(a)(1) 2, 5, 7
§ 8(a), 29 U.S.C. 657(a) 2
§ 8(b), 29 U.S.C. 657(b) 2, 3
§ 10(c), 29 U.S.C. 659(c) 10
§ 11(a), 29 U.S.C. 660(a) 10
29 C.F.R. 1904.7 6

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 84 F.3d 1. The opinion of the district court (Pet. App. 15a-39a) is reported at 903 F. Supp. 239. The recommendation of the magistrate judge (Pet. App. 42a-56a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1996. The petition for a writ of certiorari was filed on August 12, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. 651 *et seq.*, aims to assure safe and healthful working conditions for the nation's workforce. Section 5(a)(1), the Act's "general duty clause," requires every employer to provide its employees with "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." 29 U.S.C. 654(a)(1). In addition, the Act directs the Secretary of Labor to promulgate occupational health and safety standards applicable to all employers, and to undertake investigations of company workplaces and practices in order to carry out the purposes of the Act. 29 U.S.C. 657(a). In conducting such inspections and investigations, the Secretary may, pursuant to Section 8(b) of the Act, "require * * * the production of evidence under oath." 29 U.S.C. 657(b). District courts have jurisdiction to compel compliance with subpoenas issued under Section 8(b), and may punish the failure to obey such orders as contempt. *Ibid.*

2. Petitioner operates a firearms manufacturing plant in New Hampshire. Pet. App. 15a. In August 1993, an OSHA representative arrived at the plant to conduct an inspection. *Id.* at 3a. The inspection related to an employee complaint (about air quality and housekeeping practices), as well as a Local Emphasis Program instituted by the New Hampshire area OSHA office involving the identification of employers appearing to have an unusually high incidence of workers' compensation claims involving disorders that could be caused by repetitive movements. In the course of the inspection, OSHA requested that

petitioner voluntarily produce certain records pertaining to work-related injuries and illnesses. Petitioner complied with that request. *Ibid.*

Several months later, petitioner refused to accede to OSHA's additional request that petitioner complete a questionnaire related to ergonomic issues at the plant. Pet. App. 3a. OSHA then served petitioner with a subpoena demanding the production of various specified documents, such as job descriptions, certain injury records, and descriptions, if any, of the company's ergonomic training and policies. *Id.* at 3a, 107a-109a. After petitioner refused to comply with the administrative subpoena, OSHA petitioned for enforcement in district court pursuant to 29 U.S.C. 657(b). While the subpoena enforcement action was pending, OSHA issued a citation charging petitioner with failing to provide the agency access to records of employee injuries and illnesses required to be maintained by the OSH Act. Pet. App. 12a.

3. The district court issued an order compelling petitioner to produce the documents under subpoena. Pet. App. 39a.[1] Applying the standard of reasonableness applicable to administrative subpoenas, see *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946); *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950), the district court concluded:

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[1] A magistrate judge issued a recommendation denying the Secretary's application for enforcement of the subpoena, reasoning that because OSHA had not promulgated any ergonomics standards, the agency's issuance of a subpoena seeking information pertaining to ergonomics was unauthorized. Pet. App. 49a, 56a. The district court, however, refused to adopt the magistrate's recommendation.

> Given the strong federal interest in promoting employee health and safety, as well as the data suggestive of a potential relationship between working conditions at the Company and multiple movement disorders experienced by its employees, the Secretary's request for information that might shed some light on possible causes of the injuries was reasonable. The materials sought were well defined, limited in scope, and related to the purpose of the inquiry: to determine if indeed a causal link between injuries and working conditions existed.

Pet. App. 29a-30a. The court also rejected petitioner's challenge to the citation, concluding that it was without jurisdiction to review OSHA's action. *Id.* at 38a.

4. The court of appeals affirmed. Pet. App. 1a-13a. Viewing the central question as whether OSHA had the authority to issue the administrative subpoena, the court concluded that the agency had met the "modest requirements" of reasonableness set forth in *Morton Salt*, 338 U.S. at 652-653; *Oklahoma Press*, 327 U.S. at 208; and *United States* v. *Comley*, 890 F.2d 539, 541 (1st Cir. 1989). Pet. App. 4a-5a. First, the court rejected petitioner's argument that, because OSHA issued the subpoena pursuant to the Local Emphasis Program, the court should apply "the more stringent test applicable to administrative searches, namely, the requirement that on-site inspections be conducted pursuant to 'reasonable legislative or administrative standards.'" *Id.* at 5a (quoting *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 320 (1978)). Pointing out that OSHA was seeking to enforce its subpoena *duces tecum*, and was not seeking to conduct a physi-

cal search of petitioner's premises, the court concluded that the *Barlow's* test had "no bearing on the question" presented. Pet. App. 5a-6a.

The court then turned to petitioner's argument that OSHA lacked authority to issue the subpoena under its authority to investigate possible violations of Section 5(a)(1), the Act's general duty clause, because "ergonomic hazards are not 'recognized hazards' within the purview of" that section. Pet. App. 7a-8a. The court observed that this view "misconstrues the scope of the judicial inquiry that is appropriate at this stage." *Id.* at 8a. According to the court, because subpoena enforcement proceedings are "designed to be summary in nature," arguments relating to "the scope of an agency's substantive authority to regulate are not to be resolved" in such a proceeding.[2] *Id.* at 9a. Thus, the court concluded that the uncertainty surrounding the extent and nature of ergonomic hazards does not provide a basis for challenging the issuance of the subpoena, "especially * * * when, as now, a subpoena is designed to produce the very information that may be needed to shed light upon those questions." *Id.* at 9a-10a (quotation omitted).[3]

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[2] For similar reasons, the court rejected an argument presented by the Washington Legal Foundation, as *amicus curiae* supporting petitioner, that the court should decide whether OSHA has the authority to issue citations based on ergonomic hazards. Pet. App. 10a-11a.

[3] Nor was the court persuaded by petitioner's argument that the subpoena was abusive and overbroad because OSHA has neither issued an ergonomic standard nor defined "ergonomic hazards." Pet. App. 11a-12a. The court found that argument to be "nothing more than a cross-dressing of the argument, previously rejected, that OSHA lacks authority to

Finally, the court of appeals affirmed the district court's holding that it lacked jurisdiction to bar enforcement of the OSHA citation charging a violation of 29 C.F.R. 1904.7 based on petitioner's failure to produce certain of the subpoenaed records. Pet. App. 12a-13a. Relying on its prior decision in *Northeast Erectors Ass'n* v. *Secretary of Labor*, 62 F.3d 37 (1st Cir. 1995), the court concluded that the Act "provides only a few limited bases for original jurisdiction in the district court, and none of those bases exists here." Pet. App. 12a-13a. The court pointed out that petitioner was contesting the citation before the agency and would be entitled to raise all defenses in that proceeding. *Id.* at 13a n.5.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is unwarranted.

1. Because an administrative subpoena is at most a constructive, rather than actual, search and seizure, there is no requirement that the subpoena be based upon particular legislative or administrative standards. *Donovan* v. *Lone Steer, Inc.*, 464 U.S. 408, 414 (1984). Instead, the Court has consistently held that the Fourth Amendment is satisfied with regard to administrative subpoenas of corporate documents "if the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950); see also

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issue a subpoena pursuant to an investigation of ergonomic hazards for possible violations of the general duty clause." *Id.* at 11a.

Lone Steer, 464 U.S. at 415 ("the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome") (quoting *See* v. *City of Seattle*, 387 U.S. 541, 545 (1967)). The administrative subpoena in this case fully satisfies those "minimal limitations on administrative action," and therefore meets the "reasonableness" requirement. *See* v. *City of Seattle*, 387 U.S. at 545.

First, the subpoena in this case falls squarely within OSHA's authority to enforce the Act's general duty clause, 29 U.S.C. 654(a)(1). That clause, which broadly obligates every employer to provide a workplace "free from recognized hazards," governs employer conduct in the absence of more specific OSHA standards. See *International Union, United Auto Workers* v. *General Dynamics Land Sys. Div.*, 815 F.2d 1570, 1577 (D.C. Cir.) (employer's duty under general duty clause to protect employees may extend beyond published OSHA safety standards), cert. denied, 484 U.S. 976 (1987); *Donovan* v. *Royal Logging Co.*, 645 F.2d 822, 829 (9th Cir. 1981) ("The general duty clause applies when there are no specific standards."). As the court of appeals aptly concluded, the agency's "authority to investigate ergonomic conditions in search of possible general duty clause violations easily passes the undemanding test for the enforceability of administrative subpoenas." Pet. App. 11a.

Second, as the court of appeals also noted, it makes no difference whether "a debate rages in both legal and medical circles" over the dangers posed by, and the best methods for alleviating, ergonomic hazards, since "uncertainties of this sort do not provide a

cognizable basis for concluding *at this stage* that OSHA would not be able to issue a citation." Pet. App. 9a. Because OSHA is not required to "charge first and investigate later," the courts below properly enforced the subpoena despite the lack of "some sophisticated standard for systemically specifying ergonomic hazards." *Id.* at 11a (citing *Reich* v. *Montana Sulphur & Chem. Co.*, 32 F.3d 440, 444 (9th Cir. 1994), cert. denied, 115 S. Ct. 1355 (1995)); see also *Morton Salt Co.*, 338 U.S. at 642-643 (administrative agencies vested by statute with investigatory and enforcement duties have power similar to that of grand juries, not only to obtain evidence, but also to "investigate merely on suspicion that the law is being violated" or to obtain "assurance that it is not").

2. Petitioner's argument (Pet. 13-18) that OSHA acted outside its statutory authority and violated the Administrative Procedure Act (APA), 5 U.S.C. 553, in establishing the Local Emphasis Program that led to the subpoena likewise does not affect its enforceability. Even in the context of more invasive inspection warrants, courts have uniformly rejected the notion that an administrative plan adequate to establish probable cause must be promulgated through APA notice-and-comment procedures. See *Department of Labor* v. *Kast Metals Corp.*, 744 F.2d 1145, 1155 (5th Cir. 1984) (OSHA plan to target employers for inspection not subject to APA notice-and-comment rulemaking); *Stoddard Lumber Co.* v. *Marshall*, 627 F.2d 984, 986-988 (9th Cir. 1980) (same). Similarly, courts have held that the possible presence of ergonomic hazards at a workplace may justify a warrant. See, *e.g.*, *In re Midwest Instruments Co.*, 900 F.2d 1150, 1154 (7th Cir. 1990) (granting OSHA warrant for inspection to determine whether employees were

subjected to repetitive motion injuries in violation of general duty clause); *United States* v. *Establishment Inspection of Jeep Corp.*, 836 F.2d 1026, 1027-1028 (6th Cir. 1988) (same).

Moreover, although petitioner initially acknowledges that this case involves a subpoena, the validity of which is to be determined under the *Morton Salt* standard (Pet. 13), petitioner erroneously refers to this action as an "inspection" (see Pet. 20, 22) and then relies on two cases analyzing OSHA's authority to issue citations under the general duty clause. See Pet. 20-23 (citing *Kastalon, Inc.*, 12 O.S.H. Cas. (BNA) 1928 (1986) (involving exposure to potentially carcinogenic substance), and *American Smelting & Refining Co.* v. *OSHRC*, 501 F.2d 504 (8th Cir. 1974) (involving exposure to lead)).[4] However, neither *Kastalon* nor *American Smelting* holds that OSHA lacks authority in any or all instances to regulate ergonomics under the general duty clause. See Pet. App. 8a. Also, as the court below recognized (*id.* at 8a-9a), the fact that a party may have some defense to a later enforcement action resulting from information acquired under a subpoena is not relevant in an action to enforce the subpoena, whether the defense involves the limits of the agency's authority or the merits of the violation. See *EEOC* v. *Kloster Cruise Ltd.*, 939 F.2d 920, 922 (11th Cir. 1991) ("[A] subpoena enforcement proceeding is not the proper forum in which to litigate the question of coverage under a particular statute."); *FTC* v. *Monahan*, 832 F.2d 688, 690 (1st Cir. 1987) (dispute regarding whether agency could

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[4] Although OSHA's actions in this case began with an inspection, the only remaining issue is enforcement of the subpoena.

take enforcement action against appellants is the sort of dispute that "ought not to be 'settled in a subpoena enforcement proceeding,'" because "'[a]n agency's investigations should not be bogged down by premature challenges to its regulatory jurisdiction'" (quoting *FTC* v. *Swanson*, 560 F.2d 1, 2 (1st Cir. 1977)), cert. denied, 485 U.S. 987 (1988). As long as the agency's claim of authority is not plainly spurious, a court must enforce the subpoena and leave the merits of the claim to be addressed in a subsequent enforcement action. *Swanson*, 560 F.2d at 2.[5]

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[5] Petitioner also raises a challenge to the validity of the citation issued by OSHA for failure to produce certain of the subpoenaed documents. Pet. i. That issue is no longer raised in this case, however, because OSHA withdrew the citation shortly after the petition for a writ of certiorari was filed, and the proceeding before the Occupational Safety and Health Review Commission (OSHRC) has been dismissed. Furthermore, the courts below were correct to refuse, on jurisdictional grounds, to consider the validity of the citation, because "the law lodges exclusive jurisdiction over challenges to the validity of citations with OSHRC, subject to review by the court of appeals." Pet. App. 12a (citing 29 U.S.C. 659(c), 660(a), and *Northeast Erectors Ass'n*, 62 F.3d at 39-40). See also *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 216 (1994) (holding that the Federal Mine Safety and Health Act's "comprehensive enforcement structure" and "clear concern with channeling and streamlining the enforcement process" demonstrate an intent to preclude district court review of pre-enforcement challenge to agency action).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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